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No. 74-1579

# In the Supreme Court of the United States

OCTOBER TERM, 1974

**CASIMIR STASZCUK,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WARREN WOLFSON
221 North LaSalle Street
Chicago, Illinois 60601
*Attorney for Petitioner*

SHERMAN C. MAGIDSON
CARL P. CLAVELLI
*on the brief*

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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Petitioner, Casimir Staszcuk, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on May 16, 1975.

### OPINIONS BELOW

The majority and concurring opinions of the original panel of the Court of Appeals are reported at 502 F.2d 875, and are reprinted as Appendix A, *infra.*

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The majority and dissenting opinions of the Circuit *en banc*, as yet unreported, are reprinted as Appendix B, *infra*.

## JURISDICTION

The judgment of the Court of Appeals, Appendix C, *infra*, was entered on May 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## ISSUES PRESENTED

1. Whether the District Judge, by refusing to ask prospective jurors whether they had ever been involved in, or interested in the outcome of, a zoning matter, whether they had ever served on a petit jury in a criminal case or on a grand jury, the length of their residences at their present addresses and their immediate preceding addresses, with whom they lived and the employment status of these persons, and by refusing to ascertain the marital status of prospective male jurors, deprived Petitioner of a fair and meaningful opportunity to exercise his peremptory challenges and denied him due process of law and the right to trial by a fair and impartial jury?

2. Whether Petitioner's acceptance of voluntarily offered money, given in consideration of Petitioner's not objecting to a zoning change, amounts to extortion "under color of official right," as prohibited by the Hobbs Act, where Petitioner did not obtain this money through an illegal claim or assertion of right by virtue of his public office?

3. Whether the Hobbs Act applies, in the absence of evidence that a payment of money, or the result thereof, had any effect on interstate commerce, because of a potentiality of effect on commerce?

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article One, Section 8 of the Constitution provides in pertinent part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * * *

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * * *

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * *

Section 1951, Title 18, United States Code, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> * * *

Rule 24 of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides in pertinent part:

> (a) *Examination.* * * * In the event the court [conucts the examination, it] shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.
>
> (b) *Peremptory Challenges.* * * * If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. * * *

## STATEMENT

Petitioner, a Chicago Alderman, was charged in a nine-count indictment returned by the Grand Jury for the Northern District of Illinois with various offenses against the United States arising out of his alleged receipt of money on three occasions as a result of his not opposing three separate zoning changes sought with respect to property situated in his ward.

Counts 1 through 3 charged violations of the Hobbs Act,[1] each based on a separate transaction, but couched in the same language. Thus, Petitioner was charged with obstructing, delaying and affecting commerce "by means of extortion" in that he "obtained property not due either him or his office, in the form of $3,000, in cash, from Al C. Allen, *with his consent being induced under color of official right.*" (Emphasis added) Allen, described as a "zoning consultant" who applied to the City Council for the zoning

[1] 18 U.S.C. § 1951 (See *supra* p. 3 for pertinent text).

changes, made the payments because he "believed and feared that he would be unable to procure a zoning change * * * unless he compensated defendant to refrain from objecting to such a change as a member of the Chicago City Council." (E.g., Count 1, par. 8; R. 1, pp. 2-3)[2] These zoning changes were essential, it was charged, to enable Allen and his clients to erect buildings not authorized under existing Zoning Ordinances, and to sell the property to prospective purchasers who intended to erect buildings not authorized under existing Zoning Ordinances.[3] Finally, each count alleged that the buildings constructed, "and to be constructed," were erected, "and to be erected," with materials that moved, "and were to move" in interstate commerce.[4] (E.g., Count 1, pars. 6 and 7; R. 1, p. 2)

Counts 4 through 7 charged violations of the mail fraud statute.[5] In sum, Petitioner was described in these counts with having devised a scheme to defraud the City of Chicago, its citizens, and owners, investors, lessees and oc-

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[2] "R. ....., pp. ....." references are to the paginated trial record filed in the Court of Appeals. "Tr. ....." references are to the Transcript of Proceedings, also filed in the Court of Appeals. At times, the date of the trial proceedings is added to further identify the Transcript reference.

[3] No evidence was offered to show that Allen had any interest in the subject properties, or that he was, in any degree, interested in the structures built or intended to be built on these properties. Allen's sole interest was in the fee which he "earned" as a "zoning consultant."

[4] This form of pleading was necessary in the case of Count 3 because the building that was intended to be built as a result of the zoning change was, for reasons unrelated to the facts in this case, never built. (See, *infra*, pp. 14-15)

[5] 18 U.S.C. § 1341.

cupants of real property in Chicago of their right to have zoning and rezoning in the city regulated honestly and free from corruption, fraud and conflict of interest. (E.g. Count 4, par. 3; R. 1, pp. 6-7) The decision of the original panel of the Seventh Circuit that the mailings alleged in support of these counts were not in execution of the alleged scheme (App. A, *infra*, p. 11), upheld by the Circuit *en banc* (App. B, *infra*, p. 29), obviates further discussion of these charges.

Counts 8 and 9, respectively, charged that Petitioner filed false 1968 and 1970 income tax returns,[6] by omitting to declare $3,000 in total income for 1968 and by understating his 1970 adjusted gross income by $4,500. (R. 1, pp. 14-15)

Following jury verdicts of guilty on each count and denial of appropriate post-trial motions, Petitioner was sentenced to the custody of the Attorney General for a period of 18 months on each count, the sentences to run concurrently. (R. 18-19) The original panel of the Court of Appeals held that the requisite effect on interstate commerce had not been proved as to Count 3. (App. A, *infra*, pp. 5-7) Furthermore, the panel held that the mailings proven in support of Counts 4 through 7 were not in execution of the alleged scheme to defraud. (App. A, *infra*, pp. 9-11) Accordingly, Petitioner's conviction on these counts was reversed. The panel, however, affirmed Petitioner's conviction on the remaining counts, rejecting his claims that the District Judge's limitation of *voir dire* deprived him of a fair and meaningful opportunity to exercise his peremptory challenges, and that the evidence in this case did not establish extortion "under color of official right."

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[6] 26 U.S.C. § 7206(1).

A five-judge majority of the Circuit, rehearing the case *en banc*, reversed the holding of the panel as to Count 3, and affirmed the panel on all other grounds. In so doing, however, the majority, as had the original panel (App. A, *infra*, p. 12), expressed its disapproval of the District Judge's refusal to inquire about the marital status of male jurors or to ascertain the employment status of their spouses. (App. B, *infra*, p. 29, n.20)

Three judges dissented from the view of the majority as to the proof of effect on interstate commerce. In sum, they adhered to the view of the original panel that Petitioner's conduct "had no effect whatsoever on interstate commerce * * * *" (E.g., App. B, *infra*, p. 33) Judge Pell further concluded, with respect to this application of the Hobbs Act, that the opinion of the majority represented "a substantially incorrect extension of federal jurisdiction into a localized crime." (App. B, *infra*, p. 33)

Two judges also dissented from the majority's view that the jury *voir dire* had been adequate. Judge Pell, a member of the original panel, revised his view on the basis of his re-examination of the record and Judge Swygert's dissenting opinion, and concluded that "the curtailment of sufficient opportunity to determine a proper basis for the selection of a jury was substantial enough to deny the appellant a fair trial." (App. B, *infra*, p. 41) Judge Swygert found that the refusal to ask whether a prospective juror had previously served as a petit or grand juror in criminal matters, the refusal to inquire about the length of residence of the jurors at their present addresses and about their residence immediately prior thereto, and the refusal to ask whether any of the jurors had ever resisted or taken a position with respect to any proposed zoning change—all as requested by the defendant—thwarted a meaningful op-

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portunity for the defendant to exercise his right to peremptory challenges and impinged upon the essential demands of fairness. (App. B, *infra*, pp. 31-2)

We set forth below only such facts as are necessary for a basic understanding of the case and the questions presented.

**1. By limiting the voir dire of prospective jurors, the District Judge deprived Petitioner of a fair and meaningful opportunity to exercise his peremptory challenges and thus denied him due process of law and the right to trial by a fair and impartial jury.**

Prior to trial, the defendant submitted in writing various questions to be asked prospective jurors upon their *voir dire*. (R. 5) These questions included:

"1. • • •

a. How long have you lived at your present address?

b. Where did you live before moving to your present address?

c. With whom do you live?

d. What are the names and ages of the members of your immediate family? Where do they live?

"2. Do you now or have you ever owned any real estate, including a home or apartment building?

a. If so, have you ever attempted to have the zoning for that property changed?

b. Have you ever resisted another's attempt to obtain a zoning change?

c. Have you ever taken a position one way or another with respect to any proposed zoning changes?

• • •

"9. What is the business, profession or occupation of your spouse? Parents? Children?

* * *

During the course of the *voir dire* the District Judge, although requested to do so, refused to inquire into the marital status of male jurors and whether prospective jurors had had any prior grand or petit jury experience.[7] (Tr. 53-5)

The District Judge gave general cautionary admonitions, at the inception of the *voir dire*, concerning the necessity of selecting a fair and impartial jury (Tr. 11), the presumption of innocence (Tr. 12,16), and the burden of proof. (Tr. 16-19). He inquired of the venire as a whole whether anyone knew the attorneys representing the Government or the defense, the defendant, the investigating I.R.S. Agent or Al C. Allen. (Tr. 19-21) He also inquired whether any prospective juror had been, or had a friend or relative who had been, employed by a law enforcement agency. (Tr. 24)

He asked whether any of the prospective jurors "ever had any property in which there was some discussion, or maybe more than a discussion, in regard to changing the zoning regulations in regard to this property * * *" (Tr. 21)

The District Judge asked the venire whether anyone had a prejudice against persons in politics, including elected public officials; similarly, he asked whether anyone was prejudiced against the defendant because he was an elected alderman. (Tr. 21-2) He also inquired whether any

[7] The District Judge did inquire of female jurors concerning their marital status and their husbands' occupations. (E.g., Tr. 43-4)

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prospective juror had been active in politics other than as a voter (Tr. 22), or held a political job. (Tr. 24)

He inquired whether any prospective juror had ever discussed "this particular case before coming into this jury box to serve as jurors in such a way that it would prejudice you from giving either the Government or the defendant a fair trial" (Tr. 22), and whether any prospective juror had read about this case. (Tr. 29)

Each member of the panel was asked his or her place of residence, occupation, length of occupation, and whether he or she could think of any reason why he or she could not give both sides a fair trial. (E.g., Tr. 31-33) In addition, female members of the panel were asked their marital status and, if married, their husbands' occupations. (E.g., Tr. 33-4, 51)

The entire jury selection occupied less than a full afternoon's session of court.

**2. Inasmuch as Petitioner did not obtain property through an illegal claim or assertion of right by virtue of his public office, his acceptance of voluntarily offered money did not amount to extortion "under color of official right," as prohibited by the Hobbs Act.**

*Background Procedures*

Applications for changes to the Chicago Zoning Ordinances are filed on a standard form in the City Collector's Office. The application is introduced before the City Council, and referred by the Council to its standing Committee on Building and Zoning ("Committee"). This Committee is composed of aldermen appointed by the

Mayor.[8] The Chairman of the Committee schedules the applications for discussion at public hearings.

Prior to the public hearing, a copy of the proposed amendment is also submitted to the Development and Planning Commission ("Commission"), an independent city agency. The Commission, after study, determines the desirability or undesirability of a proposed change and reports its findings and recommendation to the Committee. The Committee usually follows the recommendation of the Commission.[9] (Tr. 118-19) It does so even in the face of an opposing recommendation by the alderman in whose ward the subject property is located. However, based on one experience in the previous year, the Committee liaison officer said that, if an alderman had a strong objection to a zoning change, the Committee would deny it regardless of what the Commission recommended.

Nevertheless, at one public hearing during which a proposed zoning change in his ward was aired, Petitioner said: "I urge the Committee not to favor" the proposed change. The proposal passed nonetheless. (Tr. 393-4; D.G.Ex. 9)

Also, the Committee would often reject changes proposed or supported by an alderman, but opposed by the Commission. (Tr. 393-4; D.G.Ex. 9)

Committee decisions are made in executive sessions. The Committee has the option of opposing, rejecting, or deferring action on a proposed change. (Tr. 121-3) After the

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[8] Petitioner, a Republican alderman, was never a member of this Committee.

[9] The liaison officer for the Committee could recall only one occasion during the year preceding trial when the Committee did not follow a recommendation of the Commission. (Tr. 129)

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Committee votes its recommendation, that recommendation is presented to the City Council for vote by that body. (Tr. 96-8)

*Evidence of Extortion*

Each of the three transactions comprising the Hobbs Act counts followed the same general course. A property owner, desiring to build or to remodel an existing structure, would contact Allen regarding the procurement of a zoning change which would permit the proposed structure. (E.g., Tr. 147-9, 153-4; 173-4; 188-94) Allen charged a $5,000 fee which he described as tax deductible and refundable if the proposed change should fail.[10] (Tr. 149, 161-2; 174-7; 181-3, 190-8)

In two of the transactions Allen went to Petitioner, told him he had been consulted concerning a proposed zoning change for the specific property involved, and asked whether Petitioner had any objection to the change.[11] On both occasions, Petitioner said he would investigate the matter and get back to Allen. (Tr. 6/19/73—pp. 9, 23) Sometime later Petitioner told Allen that as far as he could see the proposed change was proper and he would not object. (Tr. 6/19/73—pp. 10, 24) At this point, in connection with the first transaction only, Allen told Petitioner either that, if he "got the zoning amendment through, there [was] $3,000 in it for him" (Tr. 6/19/73—p. 10), or that he would "take care of" Petitioner if the zoning change went through. (R. 15, p. 3)

Following his receipt of knowledge that Petitioner would not oppose the proposed changes, Allen received his

[10] In one transaction (Count 3), Allen charged a $5,500 fee.

[11] Apparently, Allen did not seek to learn Petitioner's attitude concerning the other transaction before he filed the proposed zoning change.

"fees" from his "clients." (Tr. 6/19/73—pp. 7-8, 22) Thereafter he filed, or caused the filing of, the requisite applications.[12] (Tr. 103-4; 114)

When the Committee recommended passage of the changes, Allen paid Petitioner $3,000. The first payment was in cash. (Tr. 6/19/73—pp. 13-14, 99) The second payment consisted of $1,000 in cash and a $2,000 check. (Tr. 6/19/73—pp. 19-21) The third payment consisted of $1,500 in cash and a $1,500 check. (Tr. 6/19/73—pp. 26-7)[13] Allen's clients had no knowledge of these payments.

Allen said he made these payments to Staszcuk "because [he] wasn't going to get any resistance on the zoning amendment and he [Staszcuk] had no objection to it" (Tr. 6/19/73— p. 17); and because he "didn't resist the zoning amendment change." (Tr. 6/19/73— pp. 19-20; 26-7) Asked what would have happened, in his opinion, if Petitioner had resisted the zoning change, Allen responded: "If the alderman was against the zoning amendment, I wouldn't get it." (Tr. 6/19/73— pp. 20-1)

Staszcuk attended two of the three public committee hearings and supported the proposed changes. He did not attend the public hearing held in conjunction with the Count 2 transaction. (Tr. 124-5)

All three proposals unanimously passed the City Council.

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[12] Petitioner, who testified that he was asked by the property owner involved in the Count 1 transaction to do so, filed the application for that change.

[13] Staszuck did not report the $3,000 cash payment on his 1968 tax return. He did report receiving $1,500 through a proprietorship owned by him on his 1970 return, but he did not report the remaining $4,500. Petitioner denied receiving the cash payments. He testified the checks were referral fees for real estate business he sent Allen.

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**3. The Hobbs Act does not apply in the absence of evidence that the payment of money, or the result thereof, had any effect on interstate commerce.**

It was stipulated (R. 7) that materials to construct and furnish the structures built as a result of the Count 1 and Count 2 transactions were furnished from without the State of Illinois. The situation differed with respect to the property involved in the Count 3 transaction.

After the zoning change on the property involved in this transaction was obtained, the owner took bids for the proposed animal hospital from three prospective contractors. However, the veterinarian for whom the structure was to be built "backed out on the whole deal" for reasons apparently unrelated to the zoning change. (Tr. 193) Instead, a food store and cleaning shop was built on the property.[14] (Tr. 6/19/73—193)

Arthur Long, the general construction estimator for one contractor, was the only "commerce" witness to testify. Basing his testimony on four "generally" similar animal hospitals built by his company over the past five years[15] (Tr. 6/19/73—292), Long said his company used plumbing fixtures manufactured in Ohio; to his knowledge such fixtures were not manufactured in Illinois. (Tr. 293) Thus, Long said that the plumbing fixtures which would have been used had the building been built "absolutely * * * probably would not" have come from Illinois. (Tr. 295) In explanation of his term "absolutely probably," Mr. Long said that, although components were manufactured

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[14] Asked whether those buildings could have been put up without the zoning change, the owner responded: "What is there now is what was required for the zoning before I had it changed * * *" (Tr. 193)

[15] Long was not familiar with the other bidders' sources of supply for building materials in the period following March, 1971. (Tr. 6/20/73—298)

in Illinois, he did not "know of any [cast iron] plumbing fixtures that are manufactured in Illinois." (Tr. 6/20/73—296, 299) Toilets, lavatories, sinks and bathtubs, which Long's company installed in all hospitals it built,[16] were not manufactured in Illinois. (Tr. 6/20/73—304)

Long's company had not previously used lighting fixtures manufactured in Illinois in building animal hospitals. (Tr. 293-4) He could not say, however, where the lighting fixtures that would have been used would have come from, because the choice of the fixtures was the prerogative of the electrical contractors. (Tr. 296) Some companies in Illinois did manufacture lighting fixtures. (Tr. 301)

To Long's knowledge, the only furnaces manufactured in Illinois were small residential furnaces (Tr. 294), which he did not consider appropriate for installation in an animal hospital. (Tr. 300) However, Long did not mean to say that such furnaces could not be used (Tr. 300), or that his company could not have used furnaces manufactured in Illinois. (Tr. 300-1) Long had no knowledge of the types or sources of furnaces used by others. (Tr. 301)

Long also said approximately 99 per cent of plate glass was manufactured outside of Illinois (Tr. 294), and that the glass his company would have used would not have come from Illinois. (Tr. 297, 303) Long did not know for certain that plate glass manufacturers did not have plants in Illinois, but he believed they did not. (Tr. 299) Again, Long was talking about his company's experience and not the experiences of other builders. (Tr. 304)

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[16] On recross examination it developed that Long was speaking about his company's construction, not about construction by someone else. (Tr. 6/20/73—304)

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## REASONS FOR GRANTING THE WRIT

**1. By severely limiting the voir dire of prospective jurors, the District Judge deprived Petitioner of a fair and meaningful opportunity to exercise his peremptory challenges and thus denied him due process of law and the right to trial by a fair and impartial jury.**

Petitioner, charged in a politically newsworthy case with cheating his constituents, property owners and all other citizens of the City of Chicago in the administration of Chicago's zoning ordinances, and whose defense, in part, rested on the high esteem in which he was held by his neighbors and associates (Tr. 357-69), was tried by jurors whose backgrounds were all but a mystery to him. Although a majority of the Seventh Circuit concluded "that the entire examination brought out sufficient information about the seven male jurors (and one male alternate) who were accepted to enable experienced defense counsel to make a reasonably knowledgeable use of their peremptory challenges * * * *" (App. B, *infra*, p. 29, n.20), the Record, as pointed to by Judge Swygert, dissenting, reveals the paucity of the *voir dire* as a whole.

In this case, where Petitioner was literally charged with cheating persons who may have sat on the jury, the refusal of the trial judge to ask the "few specific associational questions" (*United States* v. *Leuin*, 467 F.2d 1132, 1137 (7th Cir. 1972)), requested by the defense, deprived Petitioner of due process of law and the right to trial by a fair and impartial jury. Because of the significant role played by the jury in our system of criminal justice—both from constitutional and practical points of view—the

strictures imposed on the jury selection process in this case should not go unnoticed by this Court. Review here, if for no other reason than for providing administrative guidelines such as suggested by Judge Swygert (App. B, *infra*, pp. 32-3), would serve a needed function by advising trial courts throughout the country of the parameters of fair jury selection.[1]

The restriction on *voir dire* in this case covered a broad spectrum. Because of the nature of the charges it was essential for Petitioner to know whether any prospective juror had been interested or involved, in any degree, in the zoning process. The District Judge inquired whether any prospective juror had personally sought rezoning of his or her property (Tr. 21), but he refused to inquire whether any prospective juror had "taken a position" with respect to zoning changes sought by another. As Judge Swygert aptly noted: "Some juror may have had an experience, good or bad, with a zoning request that did not affect his real estate directly but did affect indirectly his interests either as an adjacent property owner or a nearby resident." (App. B, *infra*, p. 32) Since Petitioner was accused of cheating persons who fell into this class, he was entitled to know whether any prospective juror fit this description—not solely as a means of establishing a basis for a cause challenge, but certainly to enable him to exercise intelligently his peremptory challenges.

Similarly, Petitioner was denied an opportunity to find out the length of a prospective juror's residence at his or her present address and the juror's immediate preceding address. This inquiry had a two-fold func-

[1] The Court has already spoken on this subject in racially (*Swain* v. *Alabama*, 380 U.S. 202 (1965)) and other specially sensitive (*Irvin* v. *Dowd*, 366 U.S. 717 (1961)) cases.

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tion. First, because the zoning process is an integral part of the "neighborhood concept," Petitioner should have been allowed to determine if some prospective jurors harbored incipient prejudices by reason of some experience associated with their present or immediately past neighborhoods. A prospective juror who had moved frequently from one changing neighborhood to another would certainly have been a fit candidate for a peremptory challenge in this case. Second, Petitioner's defense depended, in part, on the esteem in which he was held by his neighbors and associates. Thus Petitioner could be expected to repose greater confidence in prospective jurors who evidenced regard for concepts of neighborhood and residential stability.

Petitioner was not permitted to ascertain the marital status of prospective male jurors and, if married, the employment status of their spouses. In today's world it is inconceivable that anyone should ignore the impact that a wife and her occupation have upon a husband's attitudes.

Along these same lines, Petitioner was forbidden to learn with whom prospective jurors lived and the employment status of these persons. Again, the attitudinal impact of such persons should not be ignored.

Finally, Petitioner was not allowed to ascertain whether any prospective juror had previously served as a petit or grand juror in criminal matters. Since grand jury service exposes the individual to the inquisitorial-accusatory process rather than the adversary process, it is not surprising that few defendants, if any, are willing to accept as petit jurors persons with grand jury experience.

Prior decisions have established that, although the District Judge has a broad discretion over the conduct of

the *voir dire* examination of prospective jurors, the "exercise of this discretion, and the restriction upon inquiries at the request of counsel * * * [are] subject to the essential demands of fairness." *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931); see also *Brown* v. *United States*, 338 F.2d 543 (D.C.Cir. 1964); *United States* v. *Lewin*, 467 F.2d 1132, 1137-8 (7th Cir. 1972).

A *voir dire* may be adequate to disclose those obvious attitudes leading to grounds to challenge for cause, but it may not allow sufficient opportunity to determine other attitudes, the discovery of which is crucial to the intelligent exercise of a peremptory challenge. Thus, while the peremptory challenge may be subsidiary to the challenge for cause (*United States* v. *Dellinger*, 7th Cir. 1972, 472 F.2d 340, 367), the opportunity for its intelligent exercise is of such paramount importance that, in order to protect that right, the District Judge has an obligation beyond merely inquiring into matters that would disqualify a juror for cause. *United States* v. *Dellinger*, 472 F.2d at 367. The denial or impairment of this right—"one of the most important * * * secured to the accused"—"is reversible error without a showing of prejudice." *Swain* v. *Alabama*, 380 U.S. 202, 219-20.

If the right to peremptory challenges must not be impaired, then it must not be empty. And if, "this right is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges." *United States* v. *Dellinger*, 472 F.2d at 368; see also *United States* v. *Lewin*, 7th Cir. 1972, 467 F.2d 1132, 1138; *United States* v. *Napoleone*, 3rd Cir. 1965, 349 F.2d 350, 353.

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The meager *voir dire* permitted by the District Judge did not allow a meaningful exercise of peremptory challenges by the defendant. In sum and in substance the defendant was compelled to exercise these challenges based upon his observance of the jurors, his knowledge of their residences and occupations (and sometimes of the length of residence and occupation), his knowledge that they had not been actively involved in politics and had not sought a zoning change for their own property, and his compelled blind acceptance of their bald assertions that they were not prejudiced against politicians and they did not see any reason why they could not be fair jurors in the case. The right to peremptory challenges clearly promises both parties more than this. *United States* v. *Dellinger*, 472 F.2d 340, 369 (7 Cir. 1972).

That this promise was breached in this case is most aptly demonstrated by the dissenting opinion of Judge Pell. (App. B, *infra*, p. 41) Judge Pell, the author of a leading Seventh Circuit decision which has recognized the problems inherent in restrictive jury *voir dire*,[2] initially concurred in the panel's decision that the *voir dire* in this case was "thorough [and] detailed." (App. A, *infra*, p. 13) Upon re-examination of the record, and "in the light of Judge Swygert's dissenting opinion," Judge Pell was "persuaded that the curtailment of sufficient opportunity to determine a proper basis for the selection of a jury was substantial enough to deny the [Petitioner] a fair trial." (App. B, *infra*, p. 41)

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[2] *United States* v. *Lewin*, 467 F.2d 1132 (7th Cir. 1972).

**2. Inasmuch as Petitioner did not obtain property through an illegal claim or assertion of right by virtue of his public office, his acceptance of voluntarily offered money did not amount to extortion "under color of official right" as prohibited by the Hobbs Act.**

The relatively uncomplicated evidence in this case, viewed in a light most favorable to the government, is susceptible of the following interpretation: on three occasions Petitioner received money from Al C. Allen as a result of Petitioner's not objecting to zoning changes on behalf of Allen's "clients." Petitioner did not solicit these payments, nor did he elicit the offers of payment by suggesting the interposition of objections. In fact, Petitioner disclosed his non-objecting status to Allen before Allen suggested payment. Thus the pure question presented is whether it is a violation of the Hobbs Act for a public official to receive and accept money not due either him or his office where the payment is voluntarily initiated by the payor and is made because of the payor's fear that he will be unable to procure a zoning change unless he pays the public official to refrain from objecting to that change, absent any assertion of right or other solicitation by the public official. Resolution of this issue is of paramount importance in terms of future prosecutions of public officials under the Hobbs Act and further intrusion of federal law enforcement into essentially local crimes.

It is Petitioner's contention that it is not a violation of the Hobbs Act's "color of official right" language defining extortion for a public official to receive and accept money not due either him or his office, unless the money was obtained through an illegal claim or assertion of right by virtue of the public office.

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The theory under which the three Hobbs Act counts in this case were prosecuted was squarely presented in the Court's instructions to the jury:

> "Now, 'extortion under color of official right' means the wrongful taking by a public officer of money not due him or his office, even though the taking was not accompanied by specific action of the defendant demonstrating force, threat or the use of fear. If you find beyond a reasonable doubt that Casimir Staszcuk used the power and authority vested in him by his position as an alderman and a member of the city council to obtain money from Al C. Allen for not objecting to the zoning changes involved in this case, and this money was not due him or the city council, then I instruct you that you have sufficient evidence to satisfy the requirements of the law that money was obtained by extortion. * * *" (Tr. 584-5)

This theory, assertedly based on the disjunctive language of Section 1951(b) (2), defining extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," has found judicial expression in *United States* v. *Kenny,* 462 F.2d 1205, 1229 (3d Cir. 1972).[3] Noting that prior decisions had held that the "under color of official right" language in the statute had no applicability to extortionate acts committed by private individuals (*Bianchi* v. *United States,* 219 F.2d 182,

[3] It should be noted that *Kenny* is not authority for the theory under which Petitioner was prosecuted, inasmuch as the decision was in response to an argument that the trial court had erred by instructing disjunctively. (462 F.2d at 1229) *Kenny* did not, therefore, settle the question of whether "color of official right" applies to facts such as are involved here.

192 (8th Cir. 1955) cert. denied, 349 U.S. 915) the Third Circuit held that public officials "may also violate the statute by a wrongful taking under color of official right," which represents a statutory adoption of the common law crime, "which could only be committed by a public official, and which did not require proof of threat, fear, or duress." (462 F.2d at 1229)

While we might agree that in the common law offense of extortion "color of official right" takes the place of force, threats or other pressures (*Bianchi* v. *United States*, 219 F.2d 182, 183 (8th Cir. 1955); *United States* v. *Sutter*, 160 F.2d 754, 756 (7th Cir. 1947)), it is not equally certain that the phrase in the Hobbs Act was intended to apply to the facts demonstrated in this case. Thus, it is our contention that Stazcuk's acceptance of gratuities as a result of his not opposing these proposals was not "under color of official right,"[4] because the gratuity was not related to his official functions.

The concept of "under color of official right" originated in the common law. And, by not defining extortion "under color of official right" in the statute, Congress evidenced an intent to maintain the definition as it was applied at common law.[5]

A tendency to differentiate between bribery and extortion on the New York analysis (*People* v. *Diogardi*, 8

[4] It may have been bribery (Ill. Rev. Stat. 1973, ch. 38, §33-1(d)), or official misconduct (Ill. Rev. Stat. 1973, ch. 38, §33-3(d)), under Illinois law for Petitioner to accept these gratuities.

[5] See, e.g., *United States* v. *Nardello*, 393 U.S. 286, 289 (1969); *United States* v. *Kenny*, 462 F.2d 1205, 1229 (3rd Cir. 1972). Compare *United States* v. *Sutter*, 160 F.2d 754, 756 (7th Cir. 1947), where Congress, in fact, did adopt a definition of extortion which differed from the common law.

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N.Y.2d 260, 203 N.Y.S.2d 870 (1960)), that the essence of bribery is "the voluntary giving of something of value to influence the performance of official duty," while the essence of extortion is "duress" (203 N.Y.S.2d at 881), has been criticized. 3 Seton Hall Law Review 1, 3-5 (1971). We do not, however, seek to draw this distinction in this case, for the second distinction involving the nature of the criminal act generated by a public official's receipt of money is more significant here.

"Color of official right" has been defined as a pretended, not a real, exercise of an officer's jurisdiction; a pretense of official right to do an act, made by one who has no such right; a claim or assumption of right to do an act by virture of an office, made by a person who is legally destitute of any such right; the use of official authority as a pretext or cover for the commission of some corrupt or vicious act. It is a technical expression and necessarily implies an illegal claim of right or of authority to do the act in question by virtue of office or official duty.[6] " 'An oficer's acts are done colore officii when they are of such a nature that his official position does not authorize the doing of such acts though they are done in a form that purports they are done by reason of official duty and by

[6] C.J.S., Color of Office, 352-353 (1955); 7 Cyc., Color of Office, 401-402 (1903) [cases cited]. Bouvier Law Dictionary, quoted in *Wilson* v. *Unselt*, 12 Bush (Ky) 215, 228 (1876), defines "color of office" as necessarily implying an illegal claim of right or authority to take the [money], or to do the act in question by virtue of office, which claim is a mere color or pretense on the part of the officer; and Wharton's Law Dictionary, also quoted in *Wilson*, says that it is "an act unjustly done by the countenance of an office, being grounded upon corruption, to which the office is a shadow and color."

virtue of his office.' * * * Colore officii is also defined as 'a pretense of official right to do an act, made by one who has no such right.' " [cases cited] *Aldridge* v. *Wooten*, 24 S.E.2d 700, 701 (Ga. App. 1943).

Unlike the definition supplied to the jury by the District Judge in the instant case, and implicitly adopted by the Seventh Circuit opinions,[7] extortion "under color of official right" does not mean the wrongful taking by a public officer of money not due him or his office. (*Supra*, at pp. 21-2) At common law, extortion is the wrongful taking of money or other thing of value that is not due, before it is due, or more than is due, by a public officer *who ostensibly acts under color or by virtue of his office. United States* v. *Laudani*, 134 F.2d 847, 851 n. 1 (3d Cir. 1942).[8] The

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[7] This case represents the first prosecution under Section 1951 to rely solely on subsection 2(b)'s definition of extortion as "the obtaining of property from another, with his consent, induced * * * under color of official right." The Seventh Circuit in *United States* v. *Braasch*, 505 F.2d 139, 150-151 (7th Cir. 1974), ruled that the officers' conduct was also prohibited by the first clause of subsection b(2) defining extortion as the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear of economic harm and not only by the "color of official right" portion of the clause. See also footnote 3, *supra*.

[8] Note 1 refers to the Annotation contained at 4 L.R.A. 360 (1889):

> "At common law, extortion is the taking, by color of office, money or other thing of value that is not due, before it is due, or more than is due. * * * It is the exacting of fees not provided by law, sanctioned by the court, or permitted by ancient usage. * * * To constitute the offense, the officer must have acted in his official capacity; he must have demanded and received, under color of office, *fees to which he was not entitled from whom he had a right to demand them.*" [cases cited; emphasis added.]

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District Judge adopted the language supplied by this Court in *Nardello*,[9] but failed to instruct the jury as to what acts are meant by the words "color of office." In essence, the District Judge omitted the essential element that the taking be "under color of official right."

The definition of extortion given to the jury more properly described the crimes of bribery or official misconduct. *State* v. *Pritchard*, 107 N.C. 921 (1890) differentiated between bribery and extortion, thusly:

> Bribery consists in the offering or receiving of any unlawful present or reward to or by any person in order to influence [an officer's] conduct in the exercise of any public duty.
>
> Extortion consists in the unlawful taking of money or other thing of value by an officer, under color of his office, when there is nothing due, or more than is due, or before it is due.

In other words, the person who is extorted must have believed that the officer had a legal right to do the act or receive the money because of the rightful power vested in him by virtue of his office. Thus, where public officials are concerned, the object of the payment is of import. If payment is made, where none is permitted, or in excess of what is permitted, *for the performance of the official's duty*, extortion under color of official right may be maintained. *People* v. *Rudolph*, 277 App. Div. 195,

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[9] "At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion. In many states, however, the crime of extortion has been statutorily expanded to include acts by private individuals under which property is obtained by means of force, or threats." 393 U.S. at 289.

98 N.Y.S. 2d 466 (1950); *People* v. *Samuels,* 188 Miss. 607, 71 N.Y.S.2d 562 (1947); *Collier* v. *State,* 55 Ala. 125 (1876). Contrariwise, if the payment is for something other than what the official is required by law to do, bribery is the result. *People* v. *Samuels, supra; People* v. *Rudolph, supra.* As the Supreme Court of Alabama explained, the object of the crime of extortion "is the punishment of the abuse of official power—not the obtaining of money by mere impropriety of conduct, or by fraud, by persons filling official position." *Collier* v. *State,* 55 Ala. at 127. Thus, "* * * Demanding money of a person for whom no official service has been rendered, and on whom the officer has no claim whatever, is not extortion. It may be a cheat, or it may constitute obtaining money under false preteneses * * * *" *Collier* v. *State,* 55 Ala. at 128.

Similarly, the Supreme Court of Massachusetts has held that exortion is committed by an officer who receives "more than lawful fees by color of his office and it supposes a *right* to demand fees of the person who pays them. The excess demanded is then extorsive; * * * But fees demanded of a person not liable, or voluntarily paid by a person not liable, although improperly and unjustly taken and accepted by the officer, and although, in certain cases he may be punished for the cheat or fraud, yet this is not an extortion, as the fees, if excessive, are not obtained by color of his office." *Dunlap* v. *Curtis,* 10 Mass, 210, 211 (1813). Also, *Runnells* v. *Fletcher,* 15 Mass. 525 (1819); *Ming* v. *Truett,* 1 Mont. 322 (1871).

Since the money obtained from Allen was not for official services rendered to him, extortion by "color of office" was not committed.

This is not inconsistent with the purpose intended by Representative Hobbs. On April 9, 1943, the following dialogue took place on the floor of the House:

> "Mr. Day: Mr. Chairman, I wonder if the committee is not guilty of some inadvertence in their definition of the word "extortion" on page 2, section (c). I ask the author of the bill to follow me closely. I read:
>
> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear—
>
> Up to that point it would amount to duress, it is clear intimidation or extortion. Then it states:
> or under color of official right.
>
> I want to ask this, and if you do not mean this in the bill, then so state in the interest of clarification of the future enforcement of this act and for the benefit of the House. * * *
>
> When you say that by extortion you mean getting money or property from a man with his consent or under color of official right, it would apply to an initiation fee in a labor union.
>
> Mr. Hobbs: Certainly not. "Color of official right" means absence of right but pretended assertion of right.
>
> Mr. Day: I know; but what do the words "official right" mean?
>
> Mr. Hobbs: The same thing.
>
> Mr. Day: It has not got to be by some authority?
>
> Mr. Hobbs: In other words, you pretend to be a police officer, you pretend to be a deputy sheriff, but you are not.
>
> Mr. Day: I think the change should be made that I have mentioned.
>
> Mr. Hobbs: It could not possibly apply if there was any bona fide right; it applies only to pretended right.
>
> * * *

> Mr. Sumners of Texas: May I suggest to my friend that if he will examine the language carefully I believe he will conclude that it means money acquired by some person who claims to be an officer of the law who is trying to take his money.
>
> * * *

89 Cong. Rec. 3228-3229 (1943).

The decision of the Court of Appeals in this case does violence to the statutory scheme and purpose described by the foregoing dialogue and common law history. As read by the Seventh Circuit, the Hobbs Act applies to any undue receipt of money by a public official without regard to the manner by which the official received the money. In other words, according to the Seventh Circuit view, a public official's liability under the Hobbs act does not depend on anything more than the fact that the official receives money to which he is not entitled.

In making this statement we might, at first blush, be criticized for ignoring the effect on the interstate commerce element of the statute, but the decision of the Court *en banc* as to Count 3 fairly well eliminates any practical value of that element as well.

**3. The Hobbs Act does not apply in the absence of evidence that the payment of money, or the result thereof, had any effect on interstate commerce.**

In contrast to evidence presented in support of Counts 1 and 2 showing that structures which were contemplated prior to the zoning changes were eventually built using materials obtained from without the state, the Government supported its Count 3 charge by evidence that one of three potential contractors, if it had been awarded the building contract and if the building had been built,

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would have used materials from without the State of Illinois. For reasons totally unrelated to the zoning change, the proposed structure was never built.

The issue presented by these facts is whether interstate commerce may be said to have been affected merely because one of three potential contractors using materials obtained from without the State of Illinois might have constructed a building on the rezoned property had the owner of the property decided to go forward with his initial plans. The majority of the Court of Appeals recognized that this issue is both novel and significant in light of the extraordinary growth of federal criminal litigation and the continuing transfer of power from the states to the federal government. (App. B, *supra,* p. 18) The majority found, in substance, that the Hobbs Act extends to a situation involving only a potential effect on commerce. Petitioner's view, as reflected by Judge Pell in his dissenting opinion (App. B, *supra,* pp. 33-40), requires an actual affectation of commerce before the criminal statute can take effect and confer jurisdiction on the federal courts.

As Judge Pell points out, in each case applying the Hobbs Act to date, more than a mere potentiality of interstate commerce has existed. Channels of interstate commerce were actually being used and there was either a direct threat to interfere with these channels (e.g., *United States* v. *Pranno,* 385 F.2d 387 (7th Cir. 1967)), or the response to the threat—payment of money—actually interfered. E.g., *United States* v. *Amabile,* 395 F.2d 47 (7th Cir. 1968); *United States* v. *Provenzano,* 334 F.2d 678 (3rd Cir. 1964). This is the first case applying the Hobbs Act where the channels of commerce were not actually being used, and were not subsequently used.

The practical effect of the majority decision, in light of the economic realities of today, is to extend federal jurisdiction, through the vehicle of the Hobbs Act, into almost every area of crime for gain. Every taking of money has a potential effect on interstate commerce. Persons who are robbed cannot purchase goods which invariably must, at some stage, have an out-of-state origin. The decision of the majority in this case places the federal judicial and executive branches into a role not contemplated by the framers of the commerce clause or the Hobbs Act, for federal intervention may always be rationalized in any case on the economic rationale employed by the majority.

## CONCLUSION

For the above and foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WARREN WOLFSON
*Attorney for Petitioner*

SHERMAN C. MAGIDSON,
CARL P. CLAVELLI,
On the Brief.

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